

Symposium:

Reflections on the ICJ's

***LaGrand* Decision**

Foreword

The decision of the International Court of Justice (ICJ) in the *LaGrand* Case signals a significant shift in the interpretation of the ICJ's injunctive authority that is likely to impact the future work of international courts and tribunals. For the first time, the ICJ clearly states that provisional orders it issues under Article 41 of the ICJ Statute have binding effect, and that parties have a legal obligation to adhere to such orders. What has helped *LaGrand* become a prime topic for international legal discourse, however, is the intertwining of this structural change with another highly controversial issue in international law—that of capital punishment.

Karl and Walter LaGrand were German nationals who, despite having lived in the United States for almost all of their lives, had never acquired United States citizenship. Arrested in Arizona in 1982 in association with a bank robbery, they were convicted by the Superior Court of Arizona in 1984 for murder in the first degree, attempted murder in the first degree, attempted armed robbery, and kidnapping. They were subsequently sentenced to death.

Under Article 36 of the Vienna Convention on Consular Relations, to which both Germany and the United States are parties, a state that has detained a foreign national within its jurisdiction shall, upon the detainee's request, inform the consular post of such foreign national's state of the detention. In addition, the detaining authority shall inform the detainee of his or her rights to such communication. In the LaGrand brothers' case, the relevant U.S. authorities informed neither the brothers of their rights, nor the German consular post of the arrest. While the authorities in Arizona may have been unaware of the LaGrands' German nationality at the time of the arrest, they also did not inform the relevant parties of their Article 36 rights after discovering that information. It was only in 1992 that the LaGrands independently discovered their rights and informed the German consulate of their case.

After exhausting the state level appellate process, during which they remained uninformed of their Vienna Convention rights, the LaGrands sought relief by instituting a new set of proceedings at the federal level. Among the various claims the brothers asserted was that the U.S. authorities' failure to inform them of their Vienna Convention rights constituted a procedural defect that required the federal court to set aside their conviction or death sentence. The federal district court, however, rejected this claim on the ground of "procedural default"—as a matter of procedure, a state defendant seeking habeas corpus in a federal court may not raise a new issue that was not

previously presented to a state court without showing an external impediment or prejudice that is obvious on its face. The Court of Appeals for the Ninth Circuit subsequently affirmed the "procedural default" ruling.

Subsequent to Arizona's execution of Karl LaGrand on February 24, 1999, Germany filed actions against the United States in the U.S. Supreme Court and the ICJ to prevent the execution of Walter LaGrand. While the U.S. Supreme Court, citing tardiness of pleas and jurisdictional barriers, refused to exercise jurisdiction, the ICJ issued provisional measures on March 3, 1999, ordering the United States to "take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings," and stating that the United States "should inform the Court of all the measures which it has taken in implementation of this Order." The ICJ also ordered the U.S. government to transmit the order to the Governor of Arizona. Germany immediately appealed to the U.S. Supreme Court, which refused to exercise its jurisdiction to enforce the ICJ's order. Later that day, Walter LaGrand was executed.

Two years later, the ICJ issued its final judgment in the LaGrand Case. After dismissing challenges to its jurisdiction, the court stated that the United States violated Article 36 of the Vienna Convention, with respect to both Germany and the LaGrands; that the "procedural default" rule could not excuse the United States from exercising its international legal obligations; that provisional measures issued by the ICJ are binding on the United States, which failed to carry out the court's instructions; and that the United States should prevent such violations in the future.

The ICJ's ruling immediately touched off a vigorous debate among international legal scholars regarding the court's stance on the nature of its provisional measures. Proponents of the view that these are binding orders generally argue that for such injunctive measures to have any significance, individual states must be held to the obligation to follow provisional measures with minimal regard for domestic legal or political constraints; *LaGrand*, they believe, demonstrates the likely detrimental effects a nonbinding order may have on both the individual and structural levels. Critics of the ICJ's position argue, on the other hand, that not only does the vague language contained in Article 41 of the ICJ statute support a much weaker obligation on the part of individual states, but that the court may in fact be undermining its own legitimacy by adopting such a strong stance in the face of the high likelihood that states will continue to disregard future provisional measures to protect their individual interests.

This symposium presents perspectives on the significance of the ICJ decision that reflect the divide among international legal scholars. In *The Unreality of International Law in the United States and the LaGrand Case*, Professor Joan Fitzpatrick offers seven "lessons" from *LaGrand* as exemplifying a broader resistance on the part of the United States to view international law as a meaningful constraint on the conduct of domestic officials. From the perspective of the practical import of the decision, Fitzpatrick reviews domestic case law to conclude that the ICJ decision has not resulted in a notable improvement in the United States' recalcitrant

practice regarding consular access under Article 36 of the Convention. Thus, among the “most profound” implications of the decision for Fitzpatrick is the possibility that, despite *LaGrand*’s clarification of the binding legal nature of provisional measures, the poor record of state compliance may persist, undermining the ICJ’s authority.

In *LaGrand: A Challenge to the U.S. Judiciary*, Professor John Quigley presents a more optimistic view of the significance of the decision. Quigley notes that the judgment poses challenges to U.S. courts because the ICJ presents a different view of the consequences of violating Article 36, the rights of individual detainees under the Vienna Convention, and the legal nature of interim measures. Quigley analyzes the significant disagreement between the ICJ and the United States on each of these points to conclude that the Court’s sound legal reasoning should recommend itself to the U.S. Supreme Court, and that U.S. courts at the federal and state levels should honor interim measures “lest they put the United States in violation of its obligation to comply” with the Vienna Convention. In stark contrast to Fitzpatrick’s view that the “reciprocity of treaty obligations provides insufficient leverage to induce U.S. compliance with treaty obligations,” Quigley concludes the opposite—that *LaGrand* should encourage the U.S. to reassess its position precisely because the country has more consuls than any other state, and thus “more to gain from the strict observance of the right of consular access.”

In *Recognizing Guarantees and Assurances of Non-Repetition: LaGrand and the Law of State Responsibility*, Christian Tams focuses on the first of the three aspects highlighted in Quigley’s contribution: the consequences of violating Article 36. Tams argues that the ICJ, by recognizing that a state injured by a breach of international law may be entitled to demand from the violating state guarantees and assurances that the breach will not be repeated, has influenced the legal rules governing the consequences of international wrongs. Tams’ perspective departs from Fitzpatrick’s view that the ICJ’s failure to specify a precise remedial action facilitates noncompliance and “leaves U.S. courts adrift,” as well as from Quigley’s point that the Court did not specifically order assurances of non-repetition. Far from *LaGrand* being “unduly vague,” Tams contends that the Court’s recognition of guarantees and assurances is indicative of an important trend towards a broader approach to the law of state responsibility.

Finally, in *The ICJ Ruling Against the United States*, Professor William Schabas picks up on Mr. Tams’ forward-looking conclusion that *LaGrand*’s significance lies primarily in its contribution to the resolution of future cases. Schabas argues that the ICJ, by handing down an unequivocal statement of the binding nature of provisional measures, did much to advance the protection of individuals facing capital punishment. From Schabas’ perspective, the significance of *LaGrand* lies in the Court’s failure to confine its ruling to questions of the interpretation of its own statute, suggesting instead, that an inherent function of adjudicative bodies is to order interim measures that prevent irreparable harm by preserving the status quo. Thus, despite the best efforts of the parties in *LaGrand* to maintain the death penalty as a mere

“subtext,” Schabas concludes that the decision is “very much about” capital punishment. According to Schabas, the Court has handed a powerful precedent to international human rights bodies that regularly confront death penalty issues—one that invites transposition of the principle to national courts when international treaty bodies are involved.